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NO. 492

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

CLARENCE BRANDENBURG,
Appellant,

v.

STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLEE

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OPINIONS BELOW

There are no written opinions, either reported or unreported, in this case.

JURISDICTION

This is an appeal from the final judgment of the Supreme Court of the State of Ohio entered June 12, 1968, dismissing the appeal from the Court of Appeals of the First Appellate District of Ohio dated February 16, 1968, affirming the judgment of conviction rendered in the Court of Common Pleas of Hamilton County, Ohio, on December 5, 1966. Probable jurisdiction was noted on November 18, 1968.

STATUTES INVOLVED

Ohio Revised Code Section 2923.13 — Advocating Criminal Syndicalism

> "No person shall by word of mouth or writing, advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or policital reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.
>
> Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both."

Ohio Revised Code Section 2923.12 — Criminal Syndicalism

> "As used in sections 2923.13 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

QUESTIONS PRESENTED

Counsel for the appellant has set forth four questions in this matter. However, it is our humble opinion that, in light of the arguments that counsel has set out relative to Question 1, that basically Question 1 and Question 2 are the same for the purpose of the Argument to this Court, and we will therefore join Questions 1 and 2 as presented by counsel in our response thereto. We therefore submit the following as being the questions involved in this case:

1. **Whether Ohio Revised Code Section 2923.13, prohibiting criminal syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States?**

2. **Whether Ohio Revised Code Section 2923.13, which prohibits criminal syndicalism directed against the State of Ohio, is pre-empted by Federal legislation?**

3. **Whether there was any evidence to sustain a conviction under Section 2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment?**

STATEMENT OF FACTS

In this case the defendant-appellant made pre-arrangements with a television reporter and television cameraman for their attendance at a Ku Klux Klan rally and meeting held in Hamilton County, Ohio, on June 18, 1964. The rally and meeting were to be recorded by them on sound film for re-broadcast. Subsequently the recording on the sound film was broadcast over both a local station as well as a network television station. When the cameraman and reporter arrived they were met by several hooded indi-

viduals, carrying guns. Among the items identified were a shot-gun, a rifle, and another weapon. The hooded individuals were wearing what appeared to be sheets, with holes at a point where the eyes were, to give visibility to the persons behind the sheets. (Appendix 9).

The leader of the group was identified at the trial as being the defendant-appellant in this matter. (Appendix 13, 14, 15, 19, 37, 40, 41, 43, 43, 44, 47).

The defendant-appellant at the time wore a red robe and hood and made the following statements at the rally:*

> "I would like to — how far is the nigger going to — yeah. Over there. This is what we are going to do to the niggers. I would like to ask — call this — Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark — garden. Save America. Bury the niggers. We intend to do our part.
>
> Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on.
>
> This is an organizers meeting. We have quite a few members here today which are — we have hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, caucasian race, it's possible that there might have to be some revengeance taken.

---

* *Footnote*: There is some discrepancy as to whether defendant-appellant himself actually made the statements in the first two paragraphs above set forth, or whether they were made by persons that were associated with him.

> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups – one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The defendant-appellant was subsequently arrested and indicted for violating *Section 2923.13, Ohio Revised Code (Criminal Syndicalism).*

The defendant-appellant was indicted in September, 1964, but because of motions, continuances and the taking of numerous depositions at his request, trial was not had until November 28, 1966.

At the conclusion of the evidence, and before the Court concluded its charge, and as part of its charge, the Court said:*

> The Court: "* * * Counsel for the State anything to add to the Court's charge?"
>
> Mr. Nikolin: (Counsel for State) "Nothing, your Honor."
>
> The Court: "Counsel for the defendant, anything to add to the Court's charge?"
>
> Mr. Outcalt: (Counsel for the defendant) *"NO, YOUR HONOR."* (P. 219, Transcript)

As a result of that trial, which concluded on December 5, 1966, the jury returned a verdict of "guilty" on both counts of the indictment.

A Motion for a New Trial was overruled and, thereafter, appellant appealed to the Court of Appeals for the First Appellate District of Ohio, and said Court subsequently affirmed the conviction of the lower court.

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* *Footnote*: Counsel for the appellant initially agreed to have the charge printed in the Appendix but said Appendix did not include the above matter so we are, therefore, quoting from the transcript.

Defendant-appellant then appealed to the Ohio Supreme Court, which affirmed the conviction without an opinion.

An appeal was taken to this Court and jurisdiction was subsequently noted.

ARGUMENT

QUESTION I.

Whether Ohio Revised Code Section 2923.13, prohibiting criminal syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States?

Counsel in their arguments on Question 1, as they have set it forth in their Brief, have set out the general proposition that the instructions of the Trial Court and the Law of the State of Ohio are to be read as part and parcel of the statutes to be determined. With this interpretation we will concur wholeheartedly. However, what counsel for the defendant-appellant has failed to do is to fully set forth the law of the State of Ohio relative to certain matters involved in this case.

First of all, with regard to the State of Ohio, it is a well settled doctrine in the State of Ohio that an error of omission in a court's charge to a jury will not justify a reversal, especially where counsel has made no request for specific instructions, nor has counsel made any objections to the charge of the Court which was given.

In the case of *State* v. *Cickelli,* 118 O. A. 87, 24 O. O. (2d) 420, 92 O. L. A. 338, 193 N. E. (2d) 409, dismissed for want of a debatable question in 175 O. S. 146, 23 O. O. (2d) 423, 191 N. E. (2d) 803, and further dismissed for want of a debatable question and certiorari denied by this Court in 377 U. S. 128, 12 L. Ed. (2d) 184, 84 S. Ct. 1178, the Court held in the third syllabus that:

> "An error of omission in the court's charge to the jury in a criminal case will not justify a reversal, especially in the absence of any request for further instructions where the parties were given an opportunity to make such a request."

This same general principle was re-affirmed in *State* v. *Tudor,* 154 O. S. 249, as being the law of the State of Ohio.

As can be seen from the Court's charge to the jury, with the addition of a portion of the charge as set forth in our Statement of Facts, which was left out of the Appendix, the defendant in this case, through his counsel not only was not restricted in making an objection to the Court's charge, but the Court specifically asked defense counsel if he had anything to add. To this question the defense counsel replied that he had nothing to add. Accordingly, it is the opinion of the undersigned that the Court, if anything, committed an error of omission, for which defense counsel cannot claim error in this Court in interpreting the statute involved.

Another general presumption of law, as interpreted by the Ohio courts, which we think will be shown to be relevant at a later portion of this Brief, is that the law presumes a man to intend the results and the natural consequences of his acts which are deliberately done. *15 O. Jur. (2d) 31, at page 482.* This same proposition of law has been set forth in the case of *State* v. *Schaffer,* 113 O. A. 125, 17 O. O. (2d) 114, 177 N. E. (2d) 534, and is spelled out in the first part of Syllabus 3 as follows:

> "A person may be presumed to intend results which are the natural, reasonable and probable consequences of his voluntary acts * * *"

Defense counsel in his attack upon the constitutionality of the statute involved has broadened the general attack

not only to include the specific charges for which the defendant in this case was charged by the indictment, but also by including other matters which were not before the Court, either by way of the indictment, the charge of the Court, or any other statement as set forth in the course and conduct of this trial. Specifically I am referring to that portion of the defendant-appellant's Brief which seems to be emphasized on pages 18 and 19 of his Brief, and on which he has argued matters which were never before the Court.

It is true that statute *2923.13, Ohio Revised Code,* does have some commentary about printing, publishing, editing, issuing, or knowingly circulating, etc. books, etc. However, this portion of the statute never was before the Court, and is clearly separable from the portion of the statute upon which the defendant was indicted, upon which the evidence was presented, upon which the Court charged the jury, and upon which the jury returned its verdict. As a general proposition of law, this Court will not determine hypothetical questions, or questions which are not before it. As the Court previously stated in the case of *Communist Party* v. *Subversive Control Board,* as reported in 367 U. S. 1, 81 S. Ct. 1357, and 6 L. Ed. (2d) 625 (1961), at page 674, of the law edition printing:

> "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated * * * Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analagous to rendering an advisory opinion upon a statute or a

declaratory judgment on a hypothetical case' * * * No rule of this court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'."

With the background as indicated above, we then go to the basic Question No. 1, as proposed in the list of questions presented to this Court. That question is, whether *Ohio Revised Code Section 2923.13,* prohibiting Criminal Syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States? To this question we reply that *Ohio Revised Code Section 2923.13,* as is applicable in this case, is clearly within the rights of the State of Ohio to pass, and violates none of the constitutional rights of the defendant-appellant herein.

Those portions of *Ohio Revised Code Section 2923.13,* which are relevant to the issues before this Court, and which were applied at the time of trial, are:

Sec. 2923.13 — **ADVOCATING CRIMINAL SYNDICALISM.**

1. "No person shall by word of mouth * * * advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; * * *"

2. "No person shall voluntarily assemble with any society, group, or assemblage of persons formed to * * * advocate the doctrines of criminal sydicalism. * * *"

It is our humble belief that the above provisions are the only applicable provisions of *Ohio Revised Code Section 2923.13* insofar as this case is concerned.

The Legislature of the State of Ohio has seen fit to define some of the terms as set forth in *Section 2923.13* in *Section 2923.12, Ohio Revised Code,* which says:

> Sec. 2923.12 — **CRIMINAL SYNDICALISM.**
>
> "As used in sections 2923.12 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; satotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

Certainly the Ohio statute spells out, with definition and terminology, that, as used in *Section 2923.13,* "advocate" means something more than a discussion of an abstract doctrine. We feel that the Legislature clearly showed its intention in the interpretation of *Section 2923.13* that the word "advocate" means "action" rather than just a general discussion, when the Legislature went on, under *Ohio Revised Code Section 2923.14,* which statute is not before the Court at this time, to say:

> Section 2923.14 — **ASSEMBLAGE FOR TEACHING CRIMINAL SYDICALISM.**
>
> "No person shall, by his presence, aid, or instigation, voluntarily participate in an assembly with one or more others for the purpose of *advocating or teaching the doctrines of criminal syndicalism.* * * *" (Emphasis ours).

Clearly the Legislature in its enactment of *Section 2923.14* has spelled out a specific penal provision whereby a person who discusses or teaches the doctrines of criminal syndicalism might be charged as violating a section of the Ohio Revised Code, namely 2923.14.

In Ohio, as is the case in most states, the law is that in interpreting a statute, the Courts may look to the title which the Legislature has placed on the said statute. As is stated in *50 O. Jur., Section 260, at page 244*:

> "The title of an act may be utilized for determining the purpose which induced the enactment of the law, which purpose may be considered in arriving at a correct interpretation of its terms."

In *50 O. Jur., Section 261, at page 245,* it is stated:

> "In the interpretation of statutes, the title thereof have been declared to be persuasive and entitled to great weight in determining the meaning, but not conclusive."

If, as counsel for the appellant has stated, this statute encompasses a general discussion of certain theories, why did the Legislature subsequently provide in *Ohio Revised Code Section 2923.14* an assemblage for teaching criminal syndicalism. It is also to be noted that *Section 2923.13* says:

> "To teach or advocate the doctrine of criminal syndicalism:

as against *Section 2923.14,* which states:

> "advocating or teaching the doctrine of criminal syndicalism."

It would appear to the undersigned that clearly the Legislature, in the enactment of this statute, especially when it is considered in light of the terminology used in giving a title to the statute of its intention that *Section 2923.13* was an advocacy of action, rather than a discussion, as this Court has previously defined and differenti-

ated the term of "advocacy" in *Yates* v. *United States*, 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064, (1957).

As a general proposition of law, it is the judicial obligation to support the enactment of a law-making body if this can be done. It is the duty of this Court, where constitutional questions are raised, to liberally construe the statute to save it from constitutional infirmities. It is generally presumed that the Legislature, in enacting a statute, did not intend to contravene the constitution, and it is the duty of the Court to so construe a statute as to give the effect, and at the same time preserve the constitution from invasion, if such construction can reasonably be made. This is the general law of the State of Ohio, and we believe the general law in all of the fifty states of the Union. In the case of *Dennis* v. *United States*, 341 U. S. 494, at page 501 (1951), the Court held:

> "The question with which we are concerned here is not whether Congress has such power, but whether the means by which it has employed conflict with the First and Fifth Amendments to the Constitution."

So it is in the statute currently before the Court. The question, I believe, is conceded that the State Legislature has the power, but the sole question is whether the means which it has employed conflict with the First and Fourteenth Amendments to the Constitution of the United States. It is to be pointed out that this Court in numerous cases has upheld the validity of the Smith Act. It is to be further pointed out that although the exact verbiage might be slightly different, the general intent, purpose and verbiage is the same in the Smith Act as in the Ohio statute and as in the New York statute, which was sustained in *Gitlow* v. *New York*, 268 U. S. 625 (1926), and the

California statute which was upheld by this Court in *Whitney* v. *California,* 274 U. S. 357.

The only basic difference between the Ohio statute and the Smith Act is that the Smith Act basically deals with the overthrow of government in the United States by force and violence, whereas under the Ohio law it is the unlawful acts in accomplishing political or industrial reform. It is to be further pointed out that the Ohio statute is somewhat similar to the New York penal law covering criminal anarchy, which was upheld in the case of *People* v. *Epton,* 19 N. Y. (2d) 496 (1967), *certiorari denied* 390 N. S. 29. In that case, and in many cases that have come before the Supreme Court under the Smith Act, and in the case currently before the Court, the appellants contend that the statute was over-broad and was void for vagueness, and violated the constitutional right of freedom of speech. In each of the cases involved the Court upheld the constitutionality of the statute. The Court held that the statute was not over-broad, and the Court held that the statute was not void for vagueness. The defendant-appellant lays great stress upon the decision of this Court in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 87 S. Ct. 675 (1967), in which the Court had before it the statutory scheme of an administrative regulation without benefit of any specific application or interpretation by the courts of the State of New York. This is not the case currently before this Court. The case has a specific application, namely to the specifics of the indictment. The indictment in this case is set forth on page 2 of the Appendix. For the purpose of argument in this Brief we believe that the essential words to be argued in this Brief are, in the first count:

> "unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods

> of terrorism as a means of accomplishing political reform"

and in the second count:

> "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism * * *"

Ohio Revised Code Section 2923.13 has previously been declared to be constitutional in the case of *State* v. *Kassay*, 126 O. S. 177. The Court, in that case, made the following statements at page 184. Starting out with a defense of the Ohio Bill of Rights, the Court said:

> "Section 11 of the Ohio Bill of Rights provides in part: 'Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.' It is apparent from this language that it does not guarantee the right freely and without restraint to express one's sentiments on every possible subject. It recognizes the responsibility for an abuse of the right. It indicates that there is a limit beyond which one may not go, and that, when that limit is exceeded, he enters the realm of abuse, and therefore the realm of responsibility."

The Court in this case further went on to say, at page 186:

> "The right of free speech is fundamental, but it is not absolute. Its exercise is subject to restriction by legislative authority; if restriction is required in order to protect the state and its people from serious injury."

In a similar criminal syndicalism statute in California, this Court held in *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641, [illegible] L. Ed. 1095 (1926), that the question

of whether or not one attending a Communistic convention intended to assist in the organization of a Communist Party with knowledge of its unlawful character and purpose is one of fact, a finding of which by the jury, affirmed by the reviewing court, is not open to review by the Supreme Court. The Court further held in that case that freedom of speech, which is secured by the Constitution, does not confer an absolute right to speak without responsibility whatever one may choose, or an unrestricted and unbridled license giving immunity to every possible use of language and punishing those who abuse their freedom. We are not arguing against the bare and fundamental rights of freedom of speech, freedom of the press, freedom of peaceable assembly, etc. Nor are we arguing against the cases of *Gitlow* v. *New York,* 268 U. S. 652, 69 L. Ed. 1138 (1924); *De Jonge* v. *Cregan,* 299 U. S. 353; *Herndan* v. *Lowry,* 301 U. S. 242; and many others cited which recite that legal premise. It is to be noted that the Supreme Court was not in those cases confining and restricting itself to just that proposition. On the contrary, in the *Gitlow* case the syllabi state:

> "2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.
>
> "3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question.
>
> "6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative

discretion even if the effect of a given utterance cannot accurately be foreseen.

"7. A State cannot reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction."

And, on page 670 of the Opinion (in *Gitlow*), the Court stated the following, after first upholding the constitutionality of the (New York) statute:

"This being so (the constitutionality of the statute) it may be applied to every utterance — not too trivial to be beneath the notice of the law — which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibition class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

In the case of *Bullock* v. *United States*, 265 F. (2d) 683, *certiorari denied* 78 S. Ct. 54, the Court stated that the guarantee of "free speech" does not include the right to persuade others to violate the law. There are too many cases on this subject to cite and here belabor the argument.

Although some of the states' criminal syndicalism statutes are aimed specifically at doctrines pertaining to the overthrow of the government by force, other states have legislated against any advocacy of crime or violence, or unlawful methods of terrorism as a means of accomplish-

ing industrial or political reform. Ohio's statutes fall within the latter group.

It is apparent that almost all of the reported cases, as being supportive of the law on the subject encompassed in this issue, deal with communism, sedition, espionage, and the like. Nevertheless, it is submitted that the principle is the same and, stated in essence, it is, simply, that although the First Amendment prohibits legislation against free speech, it does not give immunity for every possible use of language. (*Frohwerk* v. *United States,* 249 U. S. 204).

In the case of *Yates* v. *United States,* 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064 (1957), the Court reaffirmed the validity of the Smith Act. In particular, the Court went into the definition of the term "advocate" as used in that Statute. The Court refused to declare the Statute unconstitutional on that term. It went on to define the term "advocate" as not being a mere abstract doctrine but to advocate action. In fact, this Court, in that case, indicated that the term covered the advocacy of a future act rather than a limited terminology of an immediate act.

This Court went on to say at page 1378:

> "the essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."

In the *Yates* case, the Court further stated, at page 1375, L. ed. publication and page 318 of the U. S. Reports:

> "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court * * * The Statute does not penalize the utterance or publication of abstract doctrine or academic discussion, having no quality of

> incitement to any concrete action * * * *It is not the abstract doctrine of overthrowing organized government by unlawful means which is denounced by the Statute, but the advocacy of action for the accomplishment of that purpose* * * *" (Emphasis ours).

The Court went on to say in that case at pages 1376, 1377 L. Ed, and page 321 U. S. Reports:

> "If the government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and committed to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required. 341 U. S. 509. The essence of the Dennis holding was not that indoctrination of a group in preparation for future violent action as well as exhortation to immediate action, by advocacy found to be directed to 'action for accomplishment' of forcible overthrow, to violence is 'as a rule of principle action', and employing 'language of incitement' id. 341 U. S. 511, 512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur * * *".

In conclusion, insofar as Question No. 1 has been presented to this Court, it is the belief of the undersigned that in light of the above authorities, as heretofore set forth, *Ohio Revised Code Section 2923.13*, prohibiting criminal syndicalism in the State of Ohio, does not violate either the First or the Fourteenth Amendment of the United States Constitution.

We accordingly believe that this question should be dismissed as being without merit.

QUESTION II

Whether Ohio Revised Code Section 2923.13, which prohibits criminal syndicalism directed against the State of Ohio is preempted by federal legislation?

Counsel for the defendant-appellant appears to concede the fact that in *Uphaus* v. *Wyman,* 360 U. S. 72, 3 L. Ed. (2d) 1090, 79 S. Ct. 1040 (1959), the Court indicated that the Smith Act and the Federal Acts only excluded state legislation directed toward the overthrow of the United States Government. For the purpose of the record, I would like to quote from the *Uphaus* case at 3 L. Ed. (2d) at page 1096, where the Court stated:

> "The appellant's argument sweeps too broad. In Nelson itself we said that the 'precise holding of the Court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supercedes the enforceability of the Pennsylvania Sedition Act which proscribed the same conduct'. 350 U. S. 499. *The basis of Nelson thus rejects the notion that it stripped the states of the right to protect themselves.* All that the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that *a state could proceed with prosecution, for sedition against the state itself* * * *" (Emphasis ours)

Counsel once again argues, as it has done in previous parts of its Brief, and takes off on matters not before the Court. Quoting from the first count of the indictment, the defendant is charged with "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism * * * against the peace and dignity of the State of Ohio".

The second count of the indictment says that the defendant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism, contrary * * * and against the peace and dignity of the State of Ohio." The statement in the indictment "against the peace and dignity of the State of Ohio" is more than just a formality, as the defendant-appellant indicates in his Brief. Defense Counsel indicates that the case before the Court is different from the *Uphaus* case, in that in that case the inquiry was directed to the security of the State of New Hampshire, which counsel conceded the Supreme Court was not prepared to hold beyond the reach of the State Government.

It is to be pointed out in the first count of the indictments the words "advocate * * * crime, violence, or unlawful methods of terrorism". It is to be pointed out from the record that the defendant and the persons who were assembled with him wore robes with portions cut out at the eye level so that the persons under the robes could see out, but basically could not be identified by means of facial features. It was further indicated by virtue of the movie that was introduced as an exhibit, and by virtue of the testimony itself:

> "There were several hooded individuals carrying guns that stopped us at that point."
>
> Q. "What kind of guns, sir?"
> A. "Sir?"
>
> Q. "What kind of guns?"
> A. "I recall at least one shotgun and one rifle and I think there was another weapon." (Appendix 9)

It is to be further pointed out that on page 31 of the Appendix, under cross-examination, the following questions and answers took place:

Q. "Now you say that the shotguns and rifles that were out at this place, that they made you, I believe you said nervous?"

A. "Yes, sir."

Q. "You said that they were pointed at you. Is that correct?"

A. "In the same general direction."

Q. "I ask you, sir, did anybody make any threat with reference to any of those weapons to you or Mr. Neuber?"

A. "Not specifically. The threat was implied. Let me put it that way. My interpretation was, just don't do anything out way, those things may be loaded, and I wasn't going to ask."

It is further conceded that among the comments that were made while the men were marching around the burning cross were statements: "Let's give them back to the dark garden." "Bury the niggers." "We intend to do our part." (Appendix 5).

Just where is the "dark garden"? Is that a burial ground? Just where were they going to bury the niggers — using the quotation from the Appendix? Just what were they going to do as they were shouting these amongst other profanities and commentaries, with their guns, and their hoods over their faces so that their facial features could not be determined? It is to be pointed out that all these incidents and commentaries were identified as having been made in Hamilton County, State of Ohio. Certainly defense counsel cannot, at this point, say that to have a person going around with a hood covering his facial features, with a shotgun, a rifle, or another type of weapon, as indicated in the transcript, shouting "Bury the Nigger," "Send the Jews back to Israel", "Let's give them back to the dark garden", "We intend to do our part", "Freedom

for Whites", "Nigger will have to fight for every inch he gets from now on", under any pretense or circumstance or stretch of the imagination, be considered to be solely within the exclusive jurisdiction of the United States Government.

As the Supreme Court indicated, a State may cover and provide for the protection of its own citizens. The statements which were made as the people were marching around, upon which there is some discrepancy as to whether the defendant made any of them, or a part of them, or whether he made all of them (Appendix 42-43), clearly were acts of terrorism in light of the circumstances in which they were made. As indicated by the statements and conduct of the parties involved, these were not mere discussions or teachings of doctrines. These were statements by a small, closely knit group, ready to go out and commit terrorism right then and there and fully capable by the evidence of doing so at the time.

Resort to epithets or personal abuse is not in any sense communication or information or opinion safeguarded by the Constitution of the United States.

It is pointed out that in the charge itself the Court specifically, in reading the indictment, charged the jury that the acts involved were to be unlawful and against the peace and dignity of the State of Ohio. (Appendix, bottom 74 and top 75). If counsel determined that a clear interpretation might have been of some aid to the jury in this matter, counsel could clearly have asked for a further charge on this point. As we have previously indicated, the law of the State of Ohio is clear that the Court will not reverse on errors of omission in a charge where defense counsel has been given the opportunity to request corrections or make additions to the charge. (*State* v. *Cickelli, supra*).

As has been previously pointed out, in that portion of the charge which was printed on page 219 of the transcript, the Court specifically asked defense counsel if he had anything further to add, and defense counsel said nothing. Accordingly, being bound by the laws of the State of Ohio relative to procedures involved, it is the opinion of plaintiff-appellee in this matter that there was definitely terrorism, definitely violence in the making, which would bring this matter within the complete jurisdiction of the State of Ohio to determine.

Accordingly, we respectfully believe that Question No. 2 is without merit in this matter, and accordingly, should be dismissed.

QUESTION III

Whether there was any evidence to sustain a conviction under Section 2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment?

Counsel for defendant-appellant in his opening argument on this point, which he has raised, says, and I quote:

> "In the absence of *any evidence* whatever to support a conviction, a person who is nevertheless found guilty and convicted is denied due process of law." (Emphasis ours).

We concur with the statement of counsel insofar as this general proposition of law is concerned. Counsel for defendant-appellant, on page 31 of their Brief, does further state:

> "Yet neither the film nor transcript contain *a scintilla of evidence of advocacy of reform through violence* that would have satisfied count 1 * * *" (Emphasis ours).

With this statement of counsel for defendant-appellant we must wholeheartedly disagree, based upon the Appendix as has been submitted to this Court, the transcript and the evidence which was introduced in the trial. Without going into the irrelevant portions of the matter relative to venue, time, place, etc., and limiting our argument to the issues before the Court and more particularly to the statement of counsel that there is no evidence whatsoever to support the findings of the jury in this matter, we herewith submit portions of the record and conclusions as brought forth from the record, as we believe them to have been shown at the time of the trial, and upon which the jury based its findings of guilt, as the defendant was so found on the 5th day of December, 1966.

First of all, by virtue of the evidence as submitted, namely the film, and by the testimony itself, there were several individuals who wore hoods that appeared to be made out of a sheet, with holes for the eyes. (Appendix page 10).

Secondly, several of the hooded individuals were carrying guns, among which were rifles, shotguns and other weapons. (Appendix, page 9). The evidence further indicated that it was the defendant himself who made contact initially with the televison newsman, Harold Leonard, to come and film the activities of the defendant and his associates for dissemination over the local television station to the general public. (Appendix, pages 12, 13, 14). This portion appears to be uncontroverted.

It is also uncontroverted by the testimony and the film that there were men who were armed and were marching around a cross, and that either the defendant, or his associates who were hooded and armed, made the following statements:

"A dirty nigger."

"Let's give them back to the dark garden."

"Bury the niggers."

"We intend to do our part."

"Freedom for the whites."

"Nigger will have to fight for every inch he wants from now on."
(Appendix 25).

Defendant, by his own statement, which is admitted by counsel and is uncontroverted, initially started off one of his speeches with the words "This is an organizers' meeting. We have hundreds of members throughout the State of Ohio * * *" (Appendix, page 24).

Now when one considers that each of the items as set forth above may, or may not, be considered to be a violation of some law, or an overt act toward some act of terrorism, it is the belief of plaintiff-appellee in this matter that the overall facts as presented to the jury clearly gave the jury in this case some evidence upon which they could base their findings in this case. It is a general rule and proposition of law that appellate courts will not reverse, or set aside a judgment, where there is evidence from which the jury could have reached its findings in the matter. When we take all of the above items and put them into the surrounding background and circumstances as existed at the time, it is extremely difficult to come up with an understanding of the defendant-appellant's argument that there was the absence of any evidence whatever to support the conviction, and that there was not a scintilla of evidence of the advocacy of reform through violence. If there was not advocacy of reform through violence, why the hoods that hid the facial features for

identification purposes of the persons who were covered by them? Counsel, no doubt, will come up with some historical reason for the wearing of hoods. However, this is just one facet.

Secondly, if it was supposed to be such a peaceful meeting, in which there was no violence and no terrorism, why the guns? The carrying of guns clearly indicates violence, especially in light of the fact of the hoods hiding the faces of the persons carrying the guns. We especially point out to this Court that, as defendant-appellant has said in the Appendix, this was an organizers' meeting. (Appendix, page 24). Now it might be that we are anticipating a possible argument that there was only a small number involved in this meeting. Defense counsel appears to set forth that argument in other portions of his Brief before this Court. It is to be pointed out that the participants with their hoods, their guns, their profanities and aims clearly were capable right then and there of carrying out terroristic activities to obtain political reform.

What has not been explained, if this was a private meeting on private property, not affecting the general public, as counsel contends, is why did the defendant call in a television newsman and camerman to take the pictures. It is the opinion of plaintiff-appellee in this matter that the basic purpose of the television cameraman and newsman was for the purpose of spreading information to carry out the terrorism and violence and crime necessary to gain the objectives of the group. In the absence of any contradictory evidence, it would seem that this is a fair and logical conclusion that a jury could have reached based upon the evidence.

Counsel for defendant-appellant has stated that we have not set forth any of the purposes of the Ku Klux Klan.

In this case, words of the parties involved speak for themselves. This was an organizers' meeting by defendant-appellant's own admission. Either defendant-appellant, or persons who were working with him, made the statements attributed, which appear on pages 17 and 25 of the Appendix:

"How far is the nigger going to go * * *"

"This is what we are going to do to the niggers * * *"

"A dirty nigger."

"Send the Jews back to Israel — I am for it."

"Let's give them back to the dark garden."

"Bury the nigger."

"We intend to do our part."

"Freedom for the whites."

"Niggers will have to fight for every inch he gets from now on."

It would certainly appear to be stretching the imagination to conclude the commentaries, as indicated, to be academic. Clearly the comments of the associates at this organizers' meeting, and those of the defendant cannot be separated. Clearly when you take all the facts and put them together, the guns, the hoods, the commentary that this is an organizers' meeting, the fact that it is contemplated to be played over television, certainly indicate overt acts.

The words "Bury the niggers", "niggers will have to fight for every inch he gets from now on", "Let's give them back to the dark garden", etc., clearly take the words out of the realm of a general discussion, as against the advocacy and overt acts for which the Ohio statute is aimed at preventing.

Although it is not spelled out at the trial itself, it should

also be considered that at this date in the history of our country there was extreme racial violence. Although this matter was not specifically spelled out, or presented to the jury, we feel that this Court should take judicial notice of the times at which these statements were made, which we believe will give further strength to our argument that the overt acts committed were clearly evident as acts of terrorism. As the Supreme Court stated in the case of *Yates* v. *United States, supra,* at page 1378 of L. Ed.:

> "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now, or in the future, rather than merely join in something."

It would take an extreme stretch of the imagination for someone to believe, based upon the facts as presented to the jury, under the surrounding circumstances and background, that the sole purpose of Brandenburg and his associates, at the time he was speaking and they were marching around the burned cross, they were merely discussing and speaking intellectually, rather than committing overt acts of terrorism.

It is to be specifically pointed out at this time that the defendant did not take the witness stand to state the purpose of his speech. At no time was there any testimony ever offered indicating that advocacy, on the date in question for which the defendant was indicted, was other than an advocacy of action upon the part of the persons present, as well as those persons who observed the conditions and actions on television.

In *DeJonge,* supra, the Court stated that a state statute which punishes participation for the wrongful discussion of public issues can be held under the auspices of an organization which advocates the employment of numerous

means to effect industrial or political changes is repugnant to the due process clause of the Fourteenth Amendment. Clearly as evidenced by the above points of fact, as shown by the Appendix and the record and the film, this was not a meeting for lawful discussion of public issues.

We also believe that the case of *Fiske* v. *Kansas*, 294 U. S. 380 (1921), which the defendant-appellant has cited, is also not applicable in this matter. This was no peaceable assembly as defendant-appellant has indicated. This was an organizers' meeting, with guns, hooded men, prepared to go forth and carry out its purposes, even to the extent of "burying the nigger", as the term was used in the trial.

In conclusion we respectfully request the Court to dismiss Question III as one of the bases upon which the defendant-appellant has filed his appeal.

CONCLUSION

In conclusion, we respectfully submit that those portions of *Ohio Revised Code Sections 2923.12 and 2923.14*, as involved in this case, should be upheld and held to be constitutional, and that the jury finding of guilty of the defendant herein should be sustained, and that the conviction thereon should be affirmed.

Respectfully submitted,

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